Supreme Court, U.S.
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No. 01-50

In The
Supreme Court of the United States

MATTHEW MILSTEAD,
Administrator of the Estate of Mark Milstead,

Petitioner,

v.

CHAD KIBLER; SCOTT PROCTOR; LESTER WHETZEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JEFFREY S. PARKER
747 Leigh Mill Road
Great Falls, Virginia 22066
(703) 757-6428

Counsel of Record

Of Counsel:
James R. Tate
TATE & BYWATER, LTD.
2740 Chain Bridge Road
Vienna, Virginia 22181
(703) 938-5100

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

CONCLUSION.....10

TABLE OF AUTHORITIES

Page(s)

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....4

Graham v. Connor,
490 U.S. 386 (1989).....1, 5, 9

Hill v. California,
401 U.S. 797 (1971).....8

Howlett v. Birkdale Shipping Co.,
512 U.S. 92 (1994).....4

Saucier v. Katz,
531 U.S. 991, 121 S. Ct. 2151 (2001) ..... *passim*

Tennessee v. Garner,
471 U.S. 1 (1985)..... *passim*

The respondents' brief in opposition[1] largely is unresponsive to either the questions presented for review or the reasons stated in the petition for certiorari. However, the respondents do raise one matter that is significant to a consideration of review in this case, which is this Court's recent decision in *Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. 2151 (2001). Though we agree that *Saucier* is significant, we disagree with respondents' suggestion (Opp.10-11) that it obviates the need for review in this case.

To the contrary, *Saucier* serves to narrow and focus attention on the reasons why review should be granted in this case. Unlike *Saucier*, this case does not involve a trivial "push or shove"[2] by officers making a lawful arrest. This case involves a violent killing by the police, and it was an intentional killing of an unarmed and innocent person who in fact was the victim that the officers had been dispatched to protect. Also unlike *Saucier*, this case directly presents the question of when the intentional killing by the police of an unarmed and innocent person can be constitutional under the Fourth Amendment.

This Court should answer that question, with more specificity that has been provided by its previous decisions or by the decisions of the courts of appeals, and in the process should resolve the existing conflicts of authority in the lower courts. It is an embarrassment to the rule of law in the United States that no decision of this Court has articulated a specific constitutional standard under the Fourth Amendment to limit the use of deadly force by police officers against the innocent.

1. The petition for certiorari raised four questions for review (*see* Pet.i). Respondents' brief in opposition, in re-arguing the merits of their case (Opp.5-9), completely ignores the divisions of authority that provide the grounds

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1 "Brief in Opposition to Petition for Writ of Certiorari," served on August 9, 2001 (hereinafter cited as "Opp.").

2 *See Saucier*, 121 S. Ct. at 2160 (opinion of the Court, by Kennedy, J.), 2162 (Ginsburg, J., concurring, joined by Stevens and Breyer, JJ.); both *quoting from Graham v. Connor*, 490 U.S. 386, 396 (1989).

for review under the first two questions presented (*see* Pet.15-20). Respondents do not deny the conflicts among lower court authority,[3] and argue only that the decision below was correct, which is not responsive to the range of considerations bearing on this Court's exercise of discretion on certiorari. Respondents also do not deny that the questions presented in this case are of exceptional public importance, particularly in light of recent attention to episodes of deadly police violence against the innocent (*see* Pet.23-26).

2. Respondents' re-argument of their case on the merits also serves to demonstrate the error of the courts below and the ambiguity of the law surrounding the application of summary judgment in such cases, which was the fourth question presented for review by the Petition. This is so because the respondents' case rests critically on arguments of favorable *factual* inference from certain evidence and the disregard of other evidence–a type of argument that could be made to a jury, but one that is entirely out of place as a basis for summary judgment.

Thus, as in the courts below, the respondents here emphasize some of the evidence of record–such as the claimed rapidity of the events as allegedly shown by the sounds on the 911 tape[4] and the officers' subjective

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[3] The respondents' brief cites no court of appeals' decision outside of the Fourth Circuit (*see* Opp.ii), whereas the Petition cited 16 such decisions (*see* Pet.v-vi).

[4] Of course, the objective reality is otherwise. The Virginia State Police's transcript of the 911 tape (JA601-07) shows that at least 20 seconds passed between the shots fired by Officer Proctor and the shots fired by Officer Kibler at Milstead (*see* JA606-07). In such a situation of armed confrontation, 20 seconds is a long time. What was virtually instantaneous was Officer Kibler's decision to fire his weapon twice at the person emerging from the door of the house, before that person, who in fact was Milstead, had time to do anything, or indeed even to turn in Kibler's direction, which itself would not have been a threatening act, to Kibler's admitted knowledge at that moment (*see* JA182-84). As the 911 transcript further confirms, no shots were ever fired at the police officers. Six shots were fired by the police, four at Ramey and two at Milstead, and seventh shot, fired at close range, killed Ramey. This last shot was believed to have been self-inflicted.

misperceptions (*see* Opp.3-5)-and ignore or discount other evidence of record, such as the officers' own testimony about what they saw, both inside the house and at the moment of shooting, the actual locations of the officers as being under cover and under no immediate threat from anyone, and the autopsy findings showing that Mark Milstead was shot from the side, and therefore could not have been advancing on the shooting officer Kibler (*see* Pet.4-8).

Furthermore, as in the courts below, respondents' counsel now attacks the conduct of the innocent victim that the respondents killed, arguing that Milstead did something wrong when he released his hold on the criminal Ramey (*see* Opp.7-8). Here again, we disagree, and draw a different inference from the evidence. Whether viewed from foresight or "20/20 hindsight," we believe that Milstead did exactly the right thing: being faced with two officers with guns drawn and pointed, Milstead needed to do something to indicate that he was not the aggressor, or he may have been killed at that very moment, as these particular officers obviously had better aim when shooting at the innocent than when shooting at the guilty. Milstead's fatal error was the humanitarian act of warning the officers that Ramey was armed, which caused both officers to panic and run away, abandoning Milstead alone in the house with the now-released Ramey. When Milstead attempted to follow the officers' path of retreat, he was killed by Kibler, who was waiting under cover in an ambush position. The truth of this case is that the officers' incompetence and panic are what killed Mark Milstead.

Unlike the respondents, we do not expect this Court to choose between these competing factual inferences from the evidence, or to select out certain items of evidence to weigh more heavily in the balance. But the lower courts should not have done so, either, as this was a decision on summary judgment, without trial. The respondents' arguments here aptly characterize the necessary basis of the decision below, which was to pick and choose among the

facts, make credibility determinations, and weigh some items of evidence over others, and therefore was an erroneous basis for summary judgment against the Petitioner under this Court's ruling decisions on summary judgment standards. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994).

That error is made all the more clear by this Court's recent decision in *Saucier*, which focuses the summary judgment process in excessive force cases on ambiguities of *law*, not competing inferences of *fact*, *see Saucier*, 121 S. Ct. at 2156-57. Nevertheless, even though it cites and discusses *Saucier*, respondents' brief in opposition here continues to confuse the qualified immunity and constitutional inquiries[5] and to confuse factual with legal disputes. This provides an early indication to this Court that *Saucier* is not clear enough to provide the needed guidance to the lower courts, and thus strengthens the grounds for granting review in this case.[6]

3. We agree that *Saucier* does narrow the focus of one of the four questions presented for review (question 3), but it does not eliminate that question, given the contrast between the facts of *Saucier* and this case. Under the rationale of *Saucier*, its holding underscores the need for this Court to clarify the legal standards applicable to the Fourth Amendment issues in the instant case of deadly force

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[5] Thus, on page 3 of the brief in opposition, respondents refer to the decision below as being based on qualified immunity, whereas in fact the court of appeals was careful to limit its discussion to Fourth Amendment analysis (*see* Pet.4a-7a, 243 F.3d at 161-63. Similarly, in two succeeding sentences in the same paragraph on page 7 of the brief in opposition, the respondents refer alternatively to "constitutional analysis" and "qualified immunity" as if they were synonymous (*see* Opp.7).

[6] In any event, given that the lower courts here did not have the benefit of *Saucier*, and that the court of appeals' opinion below fails even to consider the summary judgment posture of the case (*see* Pet.10-11, 1a-13a), if certiorari is not granted, then the decision below should be vacated summarily and remanded for further consideration in light of *Saucier*.

resulting in the intentional killing of an innocent person by the police.

Saucier involved a trivial example of an excessive force case, in which a "gratuitous shove" during an otherwise lawful arrest was alleged to constitute excessive force, *see* 121 S. Ct. 2159-60. The majority opinion's rationale for retaining a qualified immunity inquiry separate from the Fourth Amendment analysis was that there could be ambiguity in the content of the legal standard of reasonable force, *see Saucier*, 121 S. Ct. at 2156-59.

As now applied to the very different facts of this case, the narrowed question here is whether there can ever be *legal* ambiguity–not disputes on facts–as to the Fourth Amendment standard governing the use of *deadly* force. We submit that no such ambiguity should ever exist in the constitutional law of the United States, and that this Court's obligation is to insure that no such ambiguity exists. And yet, as was shown by the Petition–and not refuted by the brief in opposition–there currently are ambiguities in the application of the Fourth Amendment's "totality of the circumstances" test in cases of deadly force, which are the subject of ongoing divisions of authority among the courts of appeals (*see* Pet.14-17).

More fundamentally, there is a deficiency in this Court's previous decisions to provide specific guidance to the lower courts on the constitutional standard governing deadly force. Like *Saucier*, *Graham v. Connor*, 490 U.S. 386 (1989), was a generic excessive force case involving a "push or shove," *id.* at 396. The last time that this Court addressed deadly force under the Fourth Amendment was *Tennessee v. Garner*, 471 U.S. 1 (1985). While that decision provides a useful statement of principles, it fails to specify a test for the Fourth Amendment analysis of deadly force beyond "reasonableness." That test is not sufficiently precise to provide meaningful guidance to the courts, or to the police, in the important class of cases involving killings by the police, especially when the wrong person is killed.

The immediate context of *Garner* was the question whether deadly force could be used to prevent escape by fleeing felony suspects. This Court held that, under the Fourth Amendment, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471 U.S. at 11. This holding was supplemented by the following passage, which appears to be dictum in the context of the *Garner* facts:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by the use of deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

Id. at 11-12. We think it obvious that this passage, even if treated as authoritative, is woefully inadequate to the task of providing guidance to the lower courts in applying the Fourth Amendment to the range of instances where the police employ deadly force, many of which do not involve the *Garner* context of escape. Furthermore, the use in this passage of a "probable cause" formulation creates confusion, as it did in the courts below in this case,[7] as to whether there is such a thing as doctrine of "probable cause" to kill.

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[7] Even now, respondents continue to argue their case on the basis that the officers had "probable cause" to kill anyone on the scene (*see* Opp.2).

The correct principle to apply is one that is referred to only in passing within the discussion in *Garner*, and that principle is necessity. As in all other cases of allegedly justified homicide in our law, the use of deadly force by the police can only be "reasonable" under the Fourth Amendment where it is necessary to avoid a greater evil. This Court needs to state that principle, clearly and unambiguously, and apply it to a case, such as this one, involving the killing of an innocent and unarmed person.

Surely, this Court does not wish to see *Saucier* applied so as to produce decisions by the lower courts immunizing killings of the innocent by police on the grounds of ambiguity in the constitutional law applicable to the use of deadly force. That would not be the responsible course of action, especially where an appropriate decisional vehicle for the needed guidance is now at hand. At least that way, the lives of future innocent victims such as Mark Milstead might be saved.

4. The intentional taking of an innocent human life through a violent act committed by an officer of the law is an event that deserves the careful attention of this Court under the Fourth Amendment. Officer Kibler's shooting of Mark Mistead was not an accident. Officer Kibler intended to kill a human being, and he did kill a human being. In fact, the person killed was innocent, unarmed, and non-threatening. The defense is "mistaken identity" - that Kibler failed to recognize Milstead as the obviously non-threatening person that both Kibler and Proctor had seen less than one minute beforehand, and that defense raises serious questions of Kibler's credibility and competence. It also identifies factual disputes concerning what Kibler actually saw and did and whether Kibler or anyone else was in any imminent danger, or reasonably could have believed so. The decision below chose to ignore those issues, and thereby prevent their full development upon a trial, by ruling as a matter of law that Kibler was entitled to kill Milstead under the Fourth Amendment, essentially because Kibler was unobservant and panicky. This holding

approximates a ruling as a matter of law that anyone on the scene of a violent crime-including the victim-constitutionally may be killed by frightened police, who are entitled to shoot first and perceive later.

Such a ruling does not reflect an appropriate balance between efficient law enforcement and the preservation of innocent human life. To the contrary, the ruling below retards both of those interests, because it provides a strong disincentive for innocent citizens in distress to seek police assistance. If society's legal system cannot provide at least some degree of assurance that police assistance is likely to be less dangerous to the victim than the crime itself, then what is the point of having police protection at all? In this case, police assistance was more dangerous than the crime, because the inept intervention of the police made matters worse and resulted in the death of the victim.

Furthermore, the ruling below was reached through a series of questionable steps that deepen ongoing conflicts of authority. The court of appeals' premise was that, if Milstead in fact had been Ramey, then he constitutionally could have been killed upon emerging from the door of the house. Even this starting premise appears inconsistent with this Court's holding in *Garner*, as the shooting officer neither perceived a threatening act nor claimed that he was attempting to prevent an escape. But there is a further leap from that premise to the conclusion that Milstead also could be killed. This was based in the court below on an analogy to a mistaken-identity arrest,[8] which compounds the confusion between "probable cause" to arrest and constitutional grounds to kill by failing to balance the degree of intrusion against the officer's justification. It is one thing to conduct a non-violent arrest of the wrong person; it is quite a different thing to kill the wrong person without warning or attempting a less violent means of

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[8] The court of appeals cited and relied upon this Court's decision in *Hill v. California*, 401 U.S. 797 (1971), which involved a peaceful arrest, not a killing. (*See* Pet.9a).

restraint. An officer is required to have more justification for a killing than for an arrest, and therefore should be required to be more certain of this target before he pulls the trigger. And yet, the court of appeals' analysis suggests that mistaken arrests and mistaken killings should be treated the same way, which would set back Fourth Amendment law to the pre-*Garner* era.

But even under its point of view, the court of appeals also was required to ignore most of the evidentiary facts in the case in order to rule as a matter of law that the Fourth Amendment was not violated. Unless taken to be a clearly erroneous application of summary judgment law (*see* Point 2, above), the court of appeals' decision necessarily rules that the facts ignored were immaterial as a matter of Fourth Amendment law. That ruling is in conflict with this Court's statement of the "totality of the circumstances" test and deepens the divisions among the lower courts as to the scope of that test (*see* Pet.13-18). Among those facts now declared to be immaterial by the court below were the absence of any threatening action by Milstead prior to the shooting and indeed Milstead's demonstration that he was non-violent by his actions inside the house. As is aptly summarized by the respondents' own argument here, the court of appeals' decision necessarily rests on the view that "[t]he claims that Milstead was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants, are quite irrelevant for purposes of the constitutional analysis" (Opp.7). That is an accurate characterization of the court of appeals' rationale, but it is not an accurate application of this Court's decision in *Garner*.

The court of appeals' further reliance on putative "perceptions" by Kibler that were at variance from objective reality raises the additional problem of conflict with the purely objective test enunciated by this Court's decision in *Graham* (*see* Pet.18-20). Far from reconciling this inconsistency, the respondents now seem to argue that the Fourth Circuit's corruption of the *Graham* test into one that

renders the "actual facts" immaterial (*see* Opp.9) is a faithful application of *Graham*. If that interpretation spreads elsewhere, then it will constitutionalize killings of the innocent even where police officers' "perceptions" of threats exist only in their own imaginations.

Thus, the court of appeals decision is not merely wrong and in conflict with other circuits' authority. It also is dangerous to the physical safety of citizens, because it provides too little incentive for the police to distinguish between victims and criminals in the application of deadly force, and too little incentive for officers to distinguish reality from fantasy before discharging their deadly weapons at a human being.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit. In the alternative, the decision below should be vacated and the case remanded for further consideration in light of this Court's decision in *Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. 2151 (2001).

Respectfully submitted,

JEFFREY S. PARKER
747 Leigh Mill Road
Great Falls, Virginia 22066
(703) 757-6428

Counsel of Record

Of Counsel:
James R. Tate
TATE & BYWATER, LTD.
2740 Chain Bridge Road
Vienna, Virginia 22181
(703) 938-5100